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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Southwest Marine of San Francisco, Inc.

File: B-224508

Date: October 2, 1986

DIGEST

1. General Accounting Office will consider a protest by a potential subcontractor of a firm acting as a general agent for the Maritime Administration, since the firm is acting "by or for" the government in issuing a solicitation for ship repair and maintenance.
2. Purpose of requirement in Bid Protest Regulations that protesters serve procuring agencies with copy of their protests within 24 hours of filing with the General Accounting Office (GAO) is to inform the agency promptly of the basis for protest and to enable it to prepare a report within the required 25 working days. When an agency has actual notice of the basis for protest and delivers its report in a timely fashion, GAO will not dismiss the protest because the protester served a firm acting for the government, rather than the agency itself.
3. Under the Federal Acquisition Regulation, any change in delivery schedules, including a previously unannounced starting date, must be in writing and provided to all firms to which an invitation for bids has been issued. When a protester categorically denies that it was orally informed of a required starting date by a firm acting for the government, statement in its bid that it anticipated starting 2 weeks later would not alone be grounds for rejection of the bid.
4. A bid is rendered unacceptable when a bidder attempts to limit its liability to the government. A bid stating that the contractor will take every precaution to contain residue from abrasive blasting during preparation of ship for painting, but will consider the firm acting for the government in issuing a solicitation requiring such blasting to be responsible for any environmental violations, therefore is not acceptable.

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DECISION

Southwest Marine of San Francisco, Inc., the low bidder for a fixed price subcontract for repair and maintenance of the vessel SS AUSTRAL LIGHTNING, protests the rejection of its \$871,016 bid as nonresponsive. American President Lines, Ltd., acting as general agent for the Maritime Administration, U.S. Department of Transportation, awarded an \$882,395 contract to Triple A Shipyards, the second-low bidder, on July 16, 1986.

We deny the protest.

A threshold issue involves our jurisdiction. Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 (Supp. III 1985), our Office considers protests concerning solicitations issued by federal agencies. Our implementing Bid Protest Regulations state that we will not consider protests by subcontractors unless the procurement is "by or for" the government. 4 C.F.R. § 21.3(f)(10) (1985). In this case, American President Lines issued the solicitation pursuant to a Service Agreement with the Maritime Administration under which it manages and conducts the business of vessels owned by the United States. See 46 C.F.R. part 315 § 1(a) (1985). Thus, the procurement is reviewable as "by or for" the government. ITT Telecom Products Corp., B-221325 et al., Mar. 21, 1986, 86-1 CPD ¶ 283; Coflexip & Services, Inc., B-216634, May 16, 1985, 85-1 CPD ¶ 554.

As for our standard of review, in general provision 17.a. of the solicitation, American President Lines states that it and any of its contractors "shall comply with . . . any law or regulation applicable to federal contracts and subcontracts." We therefore will apply the Federal Acquisition Regulation (FAR) in considering whether American President Lines properly rejected Southwest Marine's bid. Cf. Coflexip, supra (discussing the Maritime Administration's qualified exception to the general procurement statutes under 40 U.S.C. § 474(16) (1982 and Supp. III 1985)).

American President Lines issued the solicitation to eight prospective contractors in the form of a letter dated July 7, 1986, with specifications attached. The letter stated that the vessel was then berthed at a Triple A facility at the Hunters Point Shipyard in San Francisco; that the successful contractor would be required to transfer it to its own facility and return it to Hunters Point; that the ship would

be available for visits upon request; that bids were due by 1 p.m. on July 15; and that the successful bidder would be required to provide an itemized price breakdown within 24 hours of award.

An American President Lines official, in a statement prepared for the protest report, states that in order to give bidders the maximum time to work on the specifications, he telephoned all eight firms and invited them to pick up the solicitation, rather than distributing it by mail. The official states that during these calls he informed each bidder that performance would begin on July 21. American President Lines received four bids on the specified opening date, but advised the Maritime Administration that it considered Southwest Marine's nonresponsive "because it contained a counter-offer on the painting item and would not start the work until August 4."

With regard to the first of these bases for rejection, Southwest Marine contends that it did not take any exception to the specifications, but merely expressed concern that those involving preservation and painting might specify products or procedures prohibited by the Environmental Protection Agency (EPA). In its bid the firm therefore stated:

"Southwest Marine will adhere to the requirements of the specification in the form of abrasive grit blasting, and we shall take every precaution to contain the contaminate.

"In the event that EPA finds our procedures not acceptable, we consider APL [American President Lines] to be the responsible party due to the fact that the specifications mandate this type of procedure."

It offered to perform the work by an alternative method that would include "hydroblast, mechanical cleaning and feather edging of good paint" at an unspecified price.

As for the second basis for rejection, Southwest Marine asserts that it was never informed of the required July 21 starting date. The protester points out that the solicitation itself did not contain any starting date; that it could not have relied on oral advice by American President Lines purporting to amend the solicitation; and that its submission merely indicated that it "would anticipate the commencement of work on or about 4 August 1986."

In its administrative report, the Maritime Administration first argues that we should dismiss the protest on procedural grounds. The agency asserts that Southwest Marine served American President Lines, but did not serve the agency within 24 hours of filing with our Office, as required by our regulations, 4 C.F.R. § 21.1(d). The agency also points out that in its initial protest, Southwest Marine discussed only the statement in its bid regarding possible violations of EPA regulations. Because the bid was also nonresponsive as to the required starting date, the agency urges, we should dismiss the protest as academic.

We will not dismiss the protest for failure to serve the Maritime Administration. The purpose of our regulation is to inform procuring agencies promptly of the basis of protest and to enable them to prepare their reports within the 25 working days allotted by CICA. Sixth and Virginia Properties, B-220584, Jan. 14, 1986, 86-1 CPD ¶ 37. In this case, the Maritime Administration knew of the basis of protest through notice both by our Office and American President Lines, and it delivered its report to our Office in a timely fashion. In the absence of a showing that the agency was prejudiced because Southwest Marine served its agent, we do not think that dismissal is appropriate.

Nor will we dismiss the protest as academic, because we do not believe the protester's bid properly could have been rejected due to its reference to an anticipated August 4 starting date.

The only solicitation reference to a starting date is in general provision 18, which states that "the contractor's responsibility with respect to time is to commence at the time set forth when the contract is awarded. . . ." As noted above, an American President Lines official frankly admits that he used the telephone to advise bidders of the required starting date, but Southwest Marine categorically denies that it ever received this information. The FAR requires procuring agencies to provide written solicitation amendments to all firms to which an invitation has been issued whenever a change in delivery schedule occurs. 48 C.F.R. § 14.208(a) (1985). The requirement that material changes be in writing ensures that bidders compete on an equal basis by responding to the same terms and conditions. Consequently, we have sustained protests where protesters denied that they were orally advised of such changes. See CoMont, Inc., 65 Comp. Gen. 66 (1985), 85-2 CPD ¶ 555 and cases cited therein.

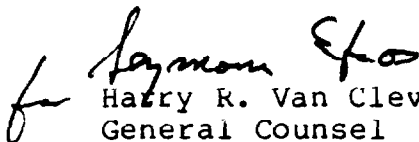
Thus, in the absence of a written amendment here, we do not think that American President Lines could have rejected the bid on the ground of a nonresponsive starting date. See Coflexip, supra.

On the main issue, however, we do not find the rejection improper. The FAR states that an individual bid "shall be rejected when the bidder imposes conditions that would modify requirements of the government or limit the bidder's liability to the government." 48 C.F.R. § 14.404-2(a).

The Maritime Administration states that the abrasive blasting required by the solicitation is not prohibited by any statute or regulation. The problem, the agency states, arises if shore water is contaminated with residue, i.e., grit, rust, and dried paint, from the process. Such contamination, the agency states, would violate not only federal environmental statutes and regulations, but also state and local water pollution laws. It is up to the contractor, who must obtain a permit for this type of work from the state of California, to prevent contamination by containment, the agency concludes, and Southwest Marine is improperly attempting to shift the risk of contamination to the government.

We agree. Although Southwest Marine stated in its bid that it would take every precaution to contain the residue of abrasive blasting, its statement also attempted to limit its liability to the government for any environmental violations. By doing so, it rendered its bid unacceptable and under FAR, 48 C.F.R. § 14.404-2(d), bid rejection was proper.

Protest denied.


Harry R. Van Cleve
General Counsel